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Francis C. Hand, Esq.
c/o Carella, Byrne, Bain, Gilfillan,
Cecchi, Stewart & Olstein
6 Becker Farm Road
Roseland, NJ 07068

EXAMINER

WILLIAMS, CATHERINE SERKE

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VINCENT L. VAILLANCOURT
and
PATRICIA VAILLANCOURT,
Appellants

Appeal 2008-1523
Application 10/773,538¹
Technology Center 3700

Decided: May 9, 2008

Before TEDDY S. GRON, CAROL A. SPIEGEL, and
DEMETRA J. MILLS, *Administrative Patent Judges*.

SPIEGEL, *Administrative Patent Judge*.

DECISION ON APPEAL

I. Statement of the Case

¹ Application 10/773,538 ("the 538 application"), titled "Needle Guard," was filed 6 February 2004, with a preliminary amendment, and is said to be a divisional of application 10/116,776, filed 4 April 2002, now U.S. Patent 6,761,706, issued 13 July 2004, which claims benefit of provisional application 60/280,991, filed 4 April 2001. The real party in interest is said to be Michael J. Vaillancourt (APPEAL BRIEF filed 22 January 2007 ("App. Br.") 3).

Appellants appeal under 35 U.S.C. § 134 from the final rejection of claims 2 and 3. Claims 4-12, the only other pending claims, are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form (FR² 3; App. Br. 3; Ans.³ 2). We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

The subject matter on appeal relates to a needle assembly with a protective needle guard to prevent accidental needle pricks.

Claims 2 and 3 read as follows (App. Br. 9, emphasis added):

2. In combination,
a hub;
a needle secured to and extending from said hub;
a needle housing removably mounted on said hub, said needle housing having an aperture at one end with said needle passing therethrough; and
a polyester film strip secured to and between said hub and said housing, said strip having a series of longitudinally spaced apart apertures receiving said needle therein and being disposed in corrugated relationship between said hub and said housing whereby in response to a withdrawal movement of said needle relative to said housing, said needle moves into said housing and into abutment with said housing while said strip is stretched between said hub and said housing to retain said housing connected to said hub under a biasing force.
3. The combination as set forth in claim 2 further comprising a washer mounted in said housing and having flaps to define an aperture for passage of said needle therethrough whereby in response to withdrawal of said needle through said aperture said flaps flex inwardly to block a return passage of said needle through said aperture.

² Final Rejection mailed 22 May 2006 ("FR") 3.

³ Examiner's Answer mailed 4 June 2007 ("Ans.") 2.

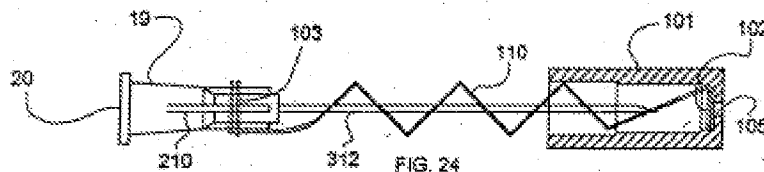
The Examiner has rejected claims 2 and 3 under 35 U.S.C. § 103(a) over Wemmert, US Patent 6,234,999 B1, issued May 22, 2001 (Ans. 3).

II. Findings of Fact ("FF")

The following findings of fact and those set out in the Discussion are supported by a preponderance of the evidence of record.

A. Appellants' Application

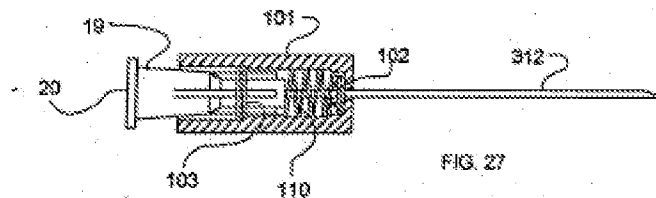
- [1] Appellants' specification describes needle guards mounted on a needle cannula which can be moved from a first position where the sharp end of a needle is substantially enclosed to a second position where the sharp end is exposed for use (Spec. 2).
- [2] The first and second positions of one embodiment of the needle guard are illustrated in Figures 24 and 27, respectively.
- [3] Figure 24 shows a needle assembly comprising a needle 312 secured to and extending from a hub 19. The needle is enclosed in a needle housing 101 having an aperture 105 and washer 102 through which the needle 312 passes when exposed for use. A corrugated polyester film strip 110 is stretched between the hub 19 and the housing 101 (Spec. 10-11). Figure 24 is reproduced below:



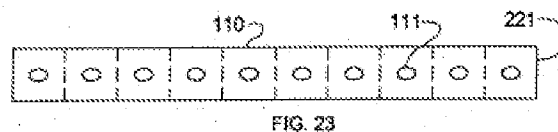
{Figure 24 shows a needle assembly comprising a needle extending at one end from a hub such that the sharp end of the needle is enclosed inside a movable housing which is connected to the hub by a corrugated plastic strip.}⁴

⁴ The text in curly braces following the Figures is provided to ensure compliance with section 508 of the U.S. Rehabilitation Act for publication of this Decision on the USPTO website pursuant to the Freedom of

- [4] Figure 27 shows a needle assembly comprising a needle 312 secured at one end to a hub 19. The needle's sharp end extends through a washer 102 and an aperture at the other end of needle housing 101. The housing 101 abuts the hub 19, whereby a corrugated plastic strip 110 connecting the hub 19 and housing 101 is accordion-folded between them (Spec. 10-11). Figure 27 is reproduced below:



- {Figure 27 shows a needle assembly comprising a needle, secured at one end to a hub, with its sharp end extending through an aperture in a needle housing abutting the hub, wherein a corrugated plastic strip connecting the hub and the housing is accordion-folded between them.}
- [5] Figure 23, showing a Mylar⁵ plastic strip 110 comprising a series of longitudinally spaced apertures 111 and scoring for corrugated (accordion) folding (Spec. 10), is reproduced below:



Information Act. It is not part of the Decision.

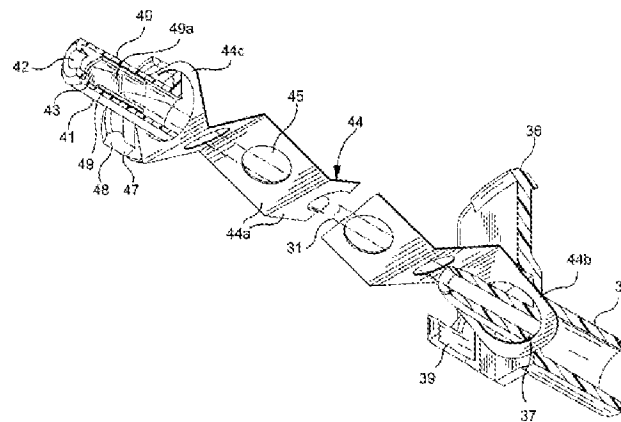
⁵ Biaxially-oriented polyethylene terephthalate (boPET) film, a polyester film, is generally used for its high tensile strength, chemical and dimensional stability, transparency, gas and aroma barrier properties, and electrical insulation. A variety of companies manufacture boPET film under a variety of different trade names. In the US and Britain, the most well-known trade names are Mylar and Melinex. <http://en.wikipedia.org/wiki/Mylar> (24 April 2008).

{Figure 23 shows a plastic strip comprising a series of longitudinally spaced apertures and scored for corrugated (accordion) folding.}

B. Wemmert

- [6] Figure 6 of Wemmert shows a needle assembly comprising a needle 31 secured to and extending from a hub 34. The needle is enclosed in a needle housing/shield 40 having an aperture 42 through which the needle passes when exposed for use. A corrugated plastic film strip/tether 44 is stretched between the hub 34 and the housing/shield 40 (Wemmert 2:63-65; 4:48-50; 5:15-28). Figure 6 is reproduced below:

FIG. 6



{Fig. 6 shows a needle assembly comprising a needle extending at one end from a hub with its other, sharp end enclosed inside a movable housing which is connected to the hub by a corrugated plastic strip.}

- [7] The tether 44 is a relatively stiff but flexible material, preferably polyethylene terephthalate, a polyester, which "provides a slight biasing force to help maintain tether 44 in the completely extended

- position . . . [which] aids in maintaining needle shield 40 in position over the sharp distal tip of . . . [the] needle 31" (Wemmert 6:37-45).
- [8] A traverse barrier 49 is located in the needle shield 40 to prevent the sharp tip of the needle 31 from being exposed once the needle 31 is withdrawn into the main body of the needle shield 41 (Wemmert 5:37-56).
- [9] Traverse barrier 49 is preferably formed from a resilient metal, such as thin stainless steel, with two lips/flaps 49a configured to prevent reexposure of the sharp tip of the needle 31 (*id.*).
- [10] According to Wemmert, "[o]ther types of transverse barriers could also be used" (Wemmert 5:57).

III. Discussion

Generally, "in proceedings before the PTO, claims in an application are to be given their broadest reasonable interpretation consistent with the specification." *In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983). "The reason is simply that during . . . prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed." *In re Zletz*, 893 F.2d 391, 321 (Fed. Cir. 1989). When the supporting specification provides a narrower definition of the claim language, the claims shall be read accordingly. *Id.* However, when the specification lacks a clear term definition, the language of the claims, and accordingly the scope and content of the claimed subject matter, should be interpreted as broadly as the specification will otherwise reasonably allow.

Wemmert discloses a needle 31 secured to and extending from a hub 34, a needle housing 40 with an aperture, and a corrugated polyester PET

film strip stretched from the hub 34 to the housing 40. The PET film strip provides a slight biasing force to help maintain the housing 40 in position (FF 6 and 7).

Appellants argue that "the needle hub 24 [of Wemmert] is pushed away from the shield 40 by the tether 44 and is not drawn toward the shield 40 as it would be if the tether 44 were stretched as required by claim 2" (App. Br. 6; see also Reply Br.⁶ 2-3).⁷ Appellants further argue the 538 specification teaches that the corrugated strip is resilient, i.e., "can be stretched and can then return to its original shape" (Reply Br. 3).

The 538 specification does not define "a biasing force". Claim 2 does not require "a biasing force" in any particular direction. Claim 2 requires "a polyester film", not a resilient polyester film that returns to its original shape after being stretched. Claim 2 requires that the polyester film is capable of being stretched, i.e., extended in length. It is improper to read preferred embodiments appearing in the specification into the claims. *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 867 (Fed. Cir. 1985).

Giving claim 2 its broadest reasonable interpretation consistent with its supporting disclosure, we find no structural distinction between a combination within the scope of the appealed claims and the needle assembly combination fairly described by Wemmert. It is well settled that "anticipation is the epitome of obviousness." *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) (quoting *In re Fracalossi*, 681 F.2d 792, 794 (CCPA 1982)). Therefore, we affirm the rejection of claim 2 under § 103(a) over Wemmert.

⁶Reply Brief filed 8 June 2007 ("Reply Br.").

⁷Wemmert element 24 is a catheter hub (Wemmert 4:14-15).

Claim 3 depends from claim 2 and further requires "a washer mounted in said housing and having flaps to define an aperture for passage of said needle . . .". Giving "washer" its broadest reasonable interpretation consistent with its supporting specification, we agree with the Examiner that Wemmert discloses a washer 49 with flaps 49a mounted in the needle housing 40 as required by claim 3 (Ans. 3).

Appellants argue that a washer is a flat, thin ring or a perforated plate, not a tubular structure as depicted in Figure 5 of Wemmert (App. Br. 7-8; Reply Br. 5).

The 538 specification does not define "a washer" or limit "a washer" in any respect, e.g., material or thickness. Appellants have not pointed to, and we do not find, where Wemmert states that its drawings are made to scale. Thus, the "thinness" or "thickness" of the transverse barrier 49 of Wemmert is not apparent. Arguments based on drawings not explicitly made to scale are unavailing. *In re Wright*, 569 F.2d 1124, 1127 (CCPA 1977) ("Absent any written description in the specification of quantitative values, arguments based on measurements of a drawing are of little value.").

Giving claim 3 its broadest reasonable interpretation consistent with its supporting specification, we find that Wemmert discloses a washer with flaps, i.e., a transverse barrier 49 with lips 49a, within the scope of claim 3. Furthermore, Appellants have not challenged the Examiner's position that the transverse barrier 49 of Wemmert "has upper and lower flat portions and functions identically to the instant washer" (Ans. 5). Alternatively, it would have been obvious to one of ordinary skill in the art to replace the transverse barrier 49 of Wemmert with a more conventional washer. To hold otherwise presumes that a person having ordinary skill in the art is unknowledgable

and unskilled. *In re Sovich*, 769 F.2d 738, 743 (Fed. Cir. 1985).

Accordingly, we affirm the rejection of claim 3 under § 103(a) over Wemmert.

IV. Order

Upon consideration of the record, and for the reasons given, it is

ORDERED that the decision of the Examiner rejecting claims 2 and 3 under 35 U.S.C. § 103(a) as unpatentable over Wemmert is AFFIRMED; and,

FURTHER ORDERED that no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (2006).

AFFIRMED

Appeal 2008-1523
Application 10/773,538

MAT

Francis C. Hand, Esq.
CARELLA, BYRNE, BAIN, GILFILLAN,
CECCHI, STEWART & OLSTEIN
6 Becker Farm Road
Roseland, NJ 07068